

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 251 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and Sd/-
MR.JUSTICE A.R.DAVE Sd/-

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes
 2. To be referred to the Reporter or not? No
 3. Whether Their Lordships wish to see the fair copy
of the judgement? No
 4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the Civil Judge?
No

COMMISSIONER OF INCOME TAX

Versus

THEMIS CHEMICALS LTD.

Appearance:

MR MANISH R BHATT for Petitioner
MR KH KAJI for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

Date of decision: 20/08/98

ORAL JUDGEMENT (per R.K. Abichandani, J.)

The Income Tax Appellate Tribunal has referred
the following two questions of law for the opinion of
this court under section 256(1) of the Income-tax Act,
1961.

"1. Whether, on the facts and in the circumstances of the case and in law, the ITAT, Ahmedabad, was correct and justified in deleting an amount of Rs. 5,16,472/- for Assessment Year 1986-87 being the sales tax liabilities outstanding at the end of the previous year relevant to Assessment Year 1986-87 which is expressly disallowable u/s. 43B of the Act disregarding the effect of provision in Explanation 2 to sec. 43B of the I.T. Act which is expressly retrospective in application, and first proviso to sec. 43B of the Act inserted by Finance Act, 1987, w.e.f. 1.4.1988 and is prospective in application for and from Assessment Year 1988-89 onwards?

2. Whether, on the facts and in the circumstances of the case and in law, the ITAT, Ahmedabad, was justified in confirming CIT(A) Surat's order in directing the ITO to allow depreciation and investment allowance on the total cost of assets without deducting therefrom the amount of subsidy received by the assessee from the Government to arrive at the "Actual Cost" of the assets, as provided for u/s. 43(1) of the I.T. Act?"

2. The question No. 1 is squarely covered by the ratio of the decision in Allied Motors (P) Ltd. v. C.I.T. reported in 224 ITR 677 in which, while considering the provisions of sec. 43B of the said Act, which was inserted with effect from 1st April 1984, it was held that the first proviso added to sec. 43B by the Finance Act of 1987 made it clear that the section will not apply in relation to any sum which is actually paid by the assessee in the next accounting year if it is paid on or before the due date for furnishing the return of income in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with the return. However, the expression "any sum payable" in clause (a) of sec. 43B was open to the interpretation that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year and, therefore, Explanation 2 was added by the

Finance Act, 1989 with retrospective effect from April 1, 1984 for the purpose of removing any ambiguity that may arise due to the said expression. The Supreme Court held that sec. 43B(a), the first proviso to sec. 43B and Explanation 2 were required to be read together as giving effect to the true intention of sec. 43B and the first proviso to sec. 43B was to be treated as having a retrospective effect. In view of the ratio of the said decision of the Supreme Court, we hold that the Tribunal was justified in deleting the amount of Rs. 5,16,472/being sales tax liabilities under sec. 43B of the said Act.

3. The Question No. 2 referred to above is also covered by the decision of the Supreme Court in CIT v. P.J. Chemicals Ltd. reported in 210 ITR 830 in which the Supreme Court held that where government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the "actual cost". Such a subsidy does not partake of the incidents which attract the conditions for its deductibility from "actual cost". The amount of subsidy is not to be deducted from the "actual cost" under sec. 43(1) for the purpose of calculation of depreciation, etc. In view of the ratio of this decision of the Supreme Court, we hold that the Tribunal was right in confirming the order of the CIT (Appeals) directing the ITO to allow depreciation and investment allowance on the total cost of assets without deducting therefrom the amount of subsidy.

4. Both the above questions are, therefore, answered in the affirmative against the Revenue and in favour of the Assessee. The reference stands disposed of accordingly with no order as to costs.

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